Supreme Court, U.S.
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No. 02-1530

IN THE

Supreme Court of the United States

ALAN FURST, M.D.; MICHAEL S. HARRISON, ESQ., Individually and on behalf of all persons similarly situated,

Petitioners,

v.

STEPHEN FEINBERG; DANIEL CROWLEY; CERBERUS PARTNERS, L.P.; SACHS CREDIT PARTNERS, L.P.; FOOTHILL CAPITAL CORPORATION; SCOTT R. DANITZ; SCOTT T. LARSEN; ALLEN J. MARABITO; DOMENIC A. MEFFE; VITO PONZIO, JR.; JOSEPH D. SMITH; RICHARD M. SMITH; DONALD J. AMARAL; WILLIAM J. CASEY; L. PETER SMITH; SANDRA L. SMOLEY; RICHARD A. FINK; STEPHEN G. PAGLIUCA; JOHN DOES 1-100; CERBERUS ASSOCIATES, L.L.C.; CERBERUS CAPITAL MANAGEMENT, L.L.C.; CRAIG COURT, INC.; GOLDMAN SACHS CREDIT PARTNERS, L.P.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS STEPHEN FEINBERG AND CERBERUS PARTNERS, L.P.

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit (the "Third Circuit") correctly held that a "breach of fiduciary duty without a material misrepresentation, omission, or deception, violates neither" Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j ("Section 10(b)"), or Securities and Exchange Commission Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 ("Rule 10b-5"). (Third Circuit Op., Pet. App. A at 6a n.2.)

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Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 ..... *passim*

COUNTERSTATEMENT OF THE CASE

In their third amended complaint (the "Complaint"), Petitioners Alan Furst and Michael S. Harrison (collectively, "Petitioners"), former shareholders of Coram Healthcare Corp. ("Coram"), alleged claims for breach of fiduciary duty and corporate mismanagement against, *inter alia*, Stephen Feinberg and Cerberus Partners, L.P. (collectively, "Respondents"). Analyzing Delaware law, the United States District Court for the District of New Jersey (the "District Court") rejected those claims, finding that the Complaint stated derivative claims exercisable only by the corporation and its current shareholders. (District Court Op., Pet. App. B at 21a.)

Petitioners further alleged violations of Section 10(b) and Rule 10b-5 based upon (1) Respondents' purported failure to disclose in two press releases the aforementioned alleged breach of fiduciary duty and corporate mismanagement, and (2) their statement that Coram had no alternative to bankruptcy, when it allegedly had such an alternative. The District Court rejected those claims on the ground that the two press releases were not rendered misleading by the alleged misstatements and omissions. (*Id.* at 24a-26a.)

The Third Circuit affirmed without dissent, awarded costs to Respondents, and designated its opinion as "not precedential," demonstrating that it viewed its own decision as unimportant to the general legal community. (Third Circuit Op., Pet. App. A at 12a.) *See* Third Circuit I.O.P. Ch. 5 § 5.3 ("An opinion, whether signed or per curiam, that appears to have value only to the trial court or the parties is designated as not precedential . . . .").

Plaintiffs subsequently moved for panel rehearing and rehearing *en banc*, but those requests were denied by the Third Circuit. (Third Circuit Order Denying Panel Rehearing and Rehearing *En Banc*, Pet. App. C at 32a.)[1]

SUMMARY OF ARGUMENT

This Court in *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977), held that the federal securities laws do not apply to simple allegations of corporate mismanagement and breach of fiduciary duty without any accompanying misrepresentation, nondisclosure or deception. *Id.* at 473-76. This was precisely the analysis used by the Third Circuit in rejecting Petitioners' purported securities law claims stemming from Respondents' failure to disclose their alleged misdeeds.

Indeed, Petitioners admit that *Santa Fe* controls the disposition of their securities law claims and that the Third Circuit relied upon *Santa Fe*. (Pet. at 11, 12.) Accordingly, Petitioners at most claim that the Third Circuit misapplied *Santa Fe* to the facts of this case. (*Id.* at 9.) It did not. Moreover, contrary to Petitioners' contention that the Third Circuit's decision here gave rise to a conflict among the circuits, none of the circuit courts has held, as Petitioners suggest, that a breach of fiduciary duty or corporate mismanagement, without a material misrepresentation, omission, or deception, violates Section 10(b) and Rule 10b-5.

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1. To supplement the procedural history stated above, Respondents incorporate the facts as summarized by the Third Circuit in its December 18, 2002 opinion. (Third Circuit Op., Pet. App. A at 2a-5a.)

Finally, because this case is governed by well-settled law that issues of corporate mismanagement are within the purview of state law, it does not present a question of great importance.

REASONS FOR DENYING THE PETITION

I. THE THIRD CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENTS, AND DOES NOT CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS.

When affirming the dismissal of Petitioners' federal securities law claims, the Third Circuit explained:

> In *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 479 (1977), the Court held that Congress did not intend § 10(b) to regulate "transactions which constitute no more than internal corporate mismanagement." More directly, a breach of fiduciary duty without a material misrepresentation, omission, or deception, violates neither the statute or the rule.

(Third Circuit Op., Pet. App. A at 6a n.2.) Based on this analysis, the Third Circuit affirmed the dismissal of Petitioners' Section 10(b) claim, finding no material misstatement, omission or deception. (*Id.* at 6a-8a.) Thus, there can be no serious dispute that the Third Circuit properly applied the holding of *Santa Fe* to the case at bar.

Petitioners' suggestion that there is a circuit split on the ground that other circuits have concluded that Section 10(b) can be violated "without a material misrepresentation,

omission or deception" (*id.* at 6a n.2) is absurd. (Pet. at 7.) Petitioners discuss three cases from two other circuits in an attempt to demonstrate a conflict with the decision at issue. But the cases Petitioners cite each follow the *Santa Fe* Court's holding that acts of corporate mismanagement do not give rise to a federal securities law violation unless there is a material misrepresentation, omission or deception, a circumstance that neither the District Court nor the Third Circuit found present in this case. *See Santa Fe*, 430 U.S. at 473-76; *Field v. Trump*, 850 F.2d 938, 946-50 (2d Cir. 1988) (no Section 10(b) claim for alleged failure to disclose breach of fiduciary duty and facts concerning the interrelationship among corporate directors), *cert. denied*, 489 U.S. 1012 (1989); *Ray v. Karris*, 780 F.2d 636, 640-41 (7th Cir. 1985) ("It is axiomatic after *Santa Fe* . . . that no cause of action will be implied under the securities laws for alleged corporate mismanagement."); *Goldberg v. Meridor*, 567 F.2d 209, 218 (2d Cir. 1977) (cause of action stated where releases failed to disclose facts "necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." (*quoting* 17 C.F.R. § 240.10b-5)), *cert. denied*, 434 U.S. 1069 (1978).

Moreover, even if inconsistent with decisions in other circuits, the Third Circuit's decision would not give rise to a circuit conflict because it (1) was designated as "not precedential" (Third Circuit Op., Pet. App. A at 12a), (2) was not selected for publication, *Furst v. Feinberg*, No. 02-2357, 2002 WL 31831545 (3d Cir. Dec. 18, 2002), and (3) therefore has no precedential effect. *Cf. United States v. Goldberg*, 67 F.3d 1092, 1102 (3d Cir. 1995) ("an unpublished opinion . . . cannot constitute precedential authority for the disposition of this appeal") (citing Third Circuit internal operating procedures and *United States v.*

Turley, 891 F.2d 57, 60 (3d Cir. 1989)); *accord* Third Cir. Local App. Rule 28.3 ("For each legal proposition supported by citations in the argument, counsel shall cite to any opposing authority if such authority is binding on this court, *e.g.*, . . . *published* decisions of this court . . . .") (emphasis added).

Thus, the petition should be denied because this matter does not pose any important issue of federal securities law or give rise to any conflict among the federal courts of appeals.

II. THIS CASE DOES NOT PRESENT ANY QUESTION OF EXCEPTIONAL IMPORTANCE WARRANTING REVIEW BY THIS COURT.

Petitioners attempt to raise a doomsday scenario whereby if their Complaint is not reinstated "mischief . . . can be perpetrated by unscrupulous individuals and companies, who, like respondents here, would not hesitate to surreptitiously seize control of a public corporation through unlawful means." (Pet. at 17.) This allegation is baseless because aggrieved shareholders can pursue their breach of fiduciary duty and corporate mismanagement claims under state law in derivative actions if the corporation itself does not act. *See Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984) ("The derivative action developed in equity to enable shareholders to sue in the corporation's name where those in control of the company refused to assert a claim belonging to it."), *overruled on other grounds*, *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

Here, Petitioners lacked standing to bring a derivative claim because they sold their shares before instituting their suit, and for that reason attempted to characterize their derivative allegations as federal securities law claims. (Third Circuit Op., Pet. App. A at 8a, 10a-11a.) As this Court explained in *Santa Fe*, to permit such corporate governance allegations under Section 10(b) or Rule 10b-5 "would be to bring within the Rule a wide variety of corporate conduct traditionally left to state regulation." *Santa Fe*, 430 U.S. at 478. Thus, this allegation also does not present an issue worthy of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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